

**UNITED STATES COURT OF APPEALS
TENTH CIRCUIT**

DEC 8 1998

PATRICK FISHER
Clerk

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MARIO CARBAJAL, JR.,

Defendant-Appellant.

No. 97-2393
(D.C. CR-97-13-JC)
(District of New Mexico)

ORDER AND JUDGMENT*

Before **PORFILIO, KELLY**, and **HENRY**, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a)(2); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Mr. Carbajal was convicted of two counts of possession of a controlled substance with intent to distribute, in violation of 21 U.S.C. § 841(a)(1). The

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

first count charged that on December 11, 1996, Mr. Carbajal knowingly and intentionally possessed with intent to distribute methamphetamine. The second count charged that on the same date he knowingly and intentionally possessed with intent to distribute cocaine.

Mr. Carbajal appeals his conviction, seeking en banc reconsideration of our holding in U.S. v. Richardson, 86 F.3d 1537, 1552-53 (10th Cir.) cert. denied, 117 S.Ct. 588 (1996), that simultaneous possession of different controlled substances may constitute separate offenses under section 841(a)(1). He argues that Richardson should be overruled and that his case should be remanded with instructions to vacate the conviction and sentence on one of the two counts. He concedes, however, that if Richardson is not reconsidered, it controls the resolution of his appeal. We exercise jurisdiction over this appeal under 28 U.S.C. § 1291.

"We cannot overrule the judgment of another panel of this court . . . absent en banc reconsideration or a superseding contrary decision by the Supreme Court." In re Smith, 10 F.3d 723, 724 (10th Cir.1993) (per curium). The request for en banc reconsideration has been denied. The district court's convictions are therefore AFFIRMED.

Entered for the Court,

Robert H. Henry
Circuit Judge